86-355

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

KLAUS J. PORZIG and ELLEN PORZIG,
Petitioners,

vs.

M. NOLDEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether §724(1) of the Bankruptcy Code, which charges the trustee in bankruptcy with collecting and reducing to money property of the estate, requires the trustee to sell property in which third parties have an interest even though the estate is solvent and there is no need for additional cash in order to meet creditors' demands.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Klaus J. Porzig and Ellen Porzig; and respondent M. Nolden, the bankruptcy trustee. Other parties defendant in the original bankruptcy court adversary proceeding made no appearance in the appeal and apparently have defaulted as to the complaint. Those parties include the State of California, Tiney Mitchell, and Gladys Mitchell.

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(No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

KLAUS J. PORZIG and ELLEN PORZIG,

Petitioners

v.

M. NOLDEN, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Klaus J. Porzig and Ellen Porzig respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 3, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not been reported. It is reprinted in the appendix hereto, p. 1-a, infra.

The "Order" of the United States District Court for the Northern District of California also has not been reported. It is reprinted in the appendix hereto, p. 11-a, infra.

The "Ruling Upon Motion for Reconsideration of Motion for Summary Judgment" of the United States Bankruptcy Court of the Northern District of California also is unreported. It is reprinted in the appendix nereto, p. 20-a, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1471, Respondent's predecessor filed an adversary proceeding in the

United States Bankruptcy Court for the Northern District of California seeking, inter alia, authority to sell certain real property allegedly included among the assets of the estate of the debtor in bankruptcy, Edward R. FitzSimmons. On November 21, 1984, said Court issued its order granting summary judgment in Respondent's favor. See p. 20-a, infra.

On petitioners' appeals, the United States District Court affirmed the Bankruptcy Court on May 14, 1985; and the Ninth Circuit once again affirmed on June 3, 1986. See p. 1a, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

11 U.S.C. §704. **Duties of Trustee.**

"The trustee shall:

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court."

11 U.S.C. §726. **Distribution of property of the estate.**

(a) "Except as provided in section 510 of this title, property of the estate shall be distributed --

(1) First, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is --

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if --

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual

pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor."

STATEMENT OF THE CASE

This action concerns unimproved real property located in Mendocino County, California, on the Pacific coastline. In connection with that property, Petitioners, Klaus and Ellen Porzig, claim both a secured debt, evidenced by a first-position note and deed of trust as well as the entire beneficial ownership of the property pursuant to a written trust agreement made by the debtor. The property was acquired by the Debtor, Edward R. FitzSimmons, pursuant to a holding agreement as trustee for the Porzigs. Mr. FitzSimmons provided a downpayment of $5,000 and a note and deed

of trust in the sum of $25,000 to the sellers, Tiney and Gladys Mitchell.

The Porzigs thereafter purchased the beneficial interest in the note and deed of trust formerly held by the Mitchells, as evidenced by a recorded assignment. This interest is not disputed by the Trustee and was not disturbed by the bankruptcy court's rulings.

Although the case was filed in 1980, the Trustee only on October 22, 1982, filed a complaint seeking both to avoid the Porzigs' beneficial interest in the fee title to the property pursuant to 11 U.S.C. §544(a)(3) as a hypothetical bona fide purchaser, and to obtain the court's permission to sell the property free and clear of all interests, including the beneficial interest in the note and deed of trust held by the appellants.

Appellants filed their answer on April 30, 1984. On or about August 9, 1984, the Trustee filed her motion for partial summary judgment seeking inter alia that the bankruptcy court divest the Porzigs of their claim to the beneficial ownership of the fee title to the subject real property. Appellants opposed the motion on the grounds that the estate had become solvent (as evidenced by Declaration of Edward R. FitzSimmons) and that there was no need to sell any more assets of the estate.

The Trustee's Motion for Partial Summary Judgment was denied by the Court on September 4, 1984, on the basis that the Trustee had failed to show the absence of a triable issue of fact as to the estate's solvency. The Bankruptcy Court, however, reversed itself in November, 1984 when, upon the Trustee's

motion for reconsideration, the Court decided that the solvency or insolvency of the estate is immaterial to the Trustee's right to sell the Porzigs' real estate, and that the Porzigs will not be harmed if the property is sold. See, "Ruling Upon Motion for Reconsideration of Motion for Summary Judgment", p. 20-a, infra.

Appellants thereafter filed their Notice of Appeal; and, in due course, the Court of Appeals. In the interim, the bankruptcy court issued its orders preventing the Trustee from selling the subject property pending the appeals and this petition.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit ruled, however, that the solvency of the estate is irrelevant and presents no triable issue of fact which might impede the Trustee's

claimed statutory right to liquidate all assets of the estate. Its ruling conflicts squarely with the holding of the Seventh Circuit in In re Joslyn (7th Cir. 1952) 198 F.2d 673. Joslyn's bankruptcy had been reopened for additional administration based upon allegations that Joslyn had concealed certain assets from the bankruptcy trustee, consisting of two trusts in which Joslyn had an income interest. In due course, Joslyn petitioned the court to dismiss the reopened bankruptcy case on the basis that all creditors had been or would be paid and there was no need for further administration. The District Court agreed, finding "no justifiable reason" to hold open a bankruptcy case where there is no unsatisfied claimant (In re Joslyn (N.D. Ill. 1951) 102 F.Supp. 521, 523). The bankruptcy trustee, however,

resisted the petition based upon what he perceived as his statutory right to administer the trust assets[1]. The Seventh Circuit rejected the trustee's position, stating:

> The controversy on the present appeals presents the unusual situation of an adjudicated bankrupt, now fully solvent, having assets far more than enough to pay any claims which might be determined against him in this proceeding, who asked the bankruptcy court to fix those claims and authorized his representatives to pay them in full as fixed by the court, but was resisted on that application by the trustee in bankruptcy. That officer of the court insists upon his right to have all the assets of the bankrupt turned over to him to handle and distribute.
>
> . . .
>
> We are in entire accord with the District Court's final disposition of this protracted proceeding as explained in his

[1] Under the Bankruptcy Code, the fee payable to a trustee is calculated as a percentage of the value of the assets under his administration 11 U.S.C. §326(a). Hence, a trustee profits by administering as many assets as possible.

excellent opinion reported in 102 F.Supp. 521

In re Joslyn, supra, 198 F.2d at 674.

The Seventh Circuit thus properly recognized the futility of continued administration of excess assets by a bankruptcy trustee of a solvent estate. Yet the Ninth Circuit held that the solvency of the estate is irrelevant in determining whether to permit the trustee to administer as yet unsold assets. The Ninth Circuit erroneously attempted to distinguish Joslyn on the ground that the concealed assets were immune under Illinois law from the grasp of unsatisfied creditors. This point is irrelevant, however, for the Seventh Circuit had previously held the trust assets susceptible of bankruptcy court administration even if exempt under state law. In re Joslyn, supra, at 673. In

the Seventh Circuit's view, Joslyn's trust assets would have been subject to administration by the trustee but for the fact that the estate was solvent.

The conflict between the Seventh and Ninth Circuits must be resolved by this Court. The public can have little confidence in a bankruptcy system which condones the administration of assets, often at "fire sale" prices far below fair market value, which benefits only the trustee and the buyer in search of a bargain. Moreover, in this era of bankruptcy filings by the solvent debtor (witness, for example, Johns-Manville Corporation) or by a debtor who may well become solvent in the course of administration (as, for example, in the cases of those who file to avoid union contracts or to obtain a temporary stay of foreclosure in order to sell valuable assets

and retain the value of whatever equity may be available), it becomes more likely that bankruptcy courts will regularly deal with solvent estates.

The inequity of the Ninth Circuit's holding provides ample independent grounds for review by this Court. The ruling would needlessly divest Petitioners of their interest in extremely scenic and valuable coastline property. The Court should not countenance the taking of property to no end other than to increase trustee's fees.

The Trustee is directed by Section 704(1) of the Bankruptcy Code to "collect and reduce to money the property of the estate". This much was recognized by the Bankruptcy Court, and properly so, in ruling upon the trustee's motion for reconsideration. However, there are two very important restraints placed upon the

exercise of this power: the Trustee need act to liquidate assets and claims and to close the estate only "as expeditiously as is compatible with the best interests of parties in interest" (B.C. §704(1)); and, §726(a)(6) provides that any "property of the estate" which remains after payment of all claims "shall be distributed... to the debtor", or, as in this case, to the Porzigs as the owners of the entire equitable interest in the subject real property. The significance of these two restraints in this case is paramount, for in tandem they mandate that the solvency or insolvency of the estate is relevant and absolutely prohibit this Trustee from willy-nilly liquidating the irreplaceable assets of the estate until she can show that it is necessary to do so. Since the Trustee completely failed to present proper

evidence in rebuttal to the declarations filed by the Porzigs (let alone to prove the insolvency of the estate), it was improper for the lower courts to summarily enter judgment in the Trustee's favor.

1. The Solvency of the Estate is Indeed Relevant to the Trustee's §544 Claim

Section 544 of the Bankruptcy Code invests the Trustee with the powers of a hypothetical bona fide purchaser of the debtor's property at the instant that the petition is filed. Pursuant to these provisions, the Trustee's complaint in the subject adversary proceeding sought a judgment avoiding the Porzigs' claim to the equitable fee title, which claim is grounded upon an unrecorded trust agreement, and the right to sell the property free and clear of the Porzigs' mortgage interest.

The genesis of the Trustee's claim is section 704(1) of the Code, which authorizes her to "collect and reduce to money the property of the estate". Of course, the reason for the liquidation of the estate's property is so that creditors' claims can be paid in the order specified in §726.

However, the liquidation of all assets is not mandatory. Indeed, §704(1) itself cautions the Trustee to respect the best interests of parties in interest; §725 recognizes that property of the estate may be disposed of other than through liquidation;[2] and §726

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[2]Section 725 provides: "**Disposition of Certain Property.** After the commencement of a case under this chapter, but before final distribution of property of the estate under Section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another

recognizes that the distribution of the estate to creditors and others need not necessarily be of cash, i.e. after liquidation of all assets, but that the estate "property" may be distributed in kind. Nowhere does the Code require that the Trustee liquidate property if it would be unnecessary to do so. Liquidation of all assets is clearly unnecessary where the estate contains more than enough property to satisfy all claims.

Where a surplus exists, the Trustee need liquidate only property sufficient to pay creditors' claims. Whatever property remains must be distributed to the Debtor as required by §726(a)(6). As indicated above, there is no requirement that the distribution to the Debtor be made in cash. The distribution can be

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section of this title."

made in kind, and should be if the property in question is not fungible.

The specific property at issue in this adversary proceeding is irreplaceable coastline property which has been held for the Porzigs for many years. It would be a gross miscarriage of justice to permit the Trustee to liquidate that property before it is shown that it is necessary to do so, i.e., that the estate is in fact insolvent.

2. As The Trustee Made Absolutely No Showing That The Estate is Insolvent, Summary Judgment Was Improper.

The only evidence before the trial court on the issue of solvency is found in the "Declaration of Edward R. Fitz-Simmons in Opposition to Motion for Partial Summary Judgment". Mr. Fitz-Simmons stated:

> My bankrupt estate, in which I waived discharge, is one with substantial surplus

> assets . . . there are cash assets presently held in the range of $3,000,000 to $4,000,000. I believe that the bona fide claims are in the range of $800,000 to $900,000. While there are spurious claims in the range of approximately $10,000,000, they are entirely without merit. However, the trustee and her counsel have done little or nothing to get to the heart of the true claims in this case.

No rebuttal declaration was filed; no claims docket was introduced; no evidence of activity regarding objections to claims was presented. The bankruptcy court accordingly -- and quite properly -- ruled on September 4, 1984 that "I have to deny the motion [for summary judgment] on the grounds that this is, in my mind, a possible triable issue of fact as to whether the estate is in fact insolvent."

Although the Trustee filed a motion for rehearing, no declaration was

submitted! The sole presentation to the bankruptcy court consisted of a memorandum of points and authorities which did not even dispute that the estate is in fact solvent.

The bankruptcy court should not have granted summary judgment in favor of the Trustee based upon this scanty record. Rule 56(c), F.R.C.P., incorporated by Bankruptcy Rule 7056, explicitly provides that summary judgment may be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The record clearly showed an issue of fact not resolved by any affidavits submitted by the Trustee.

The summary judgment was premature, and should be reversed.

CONCLUSION

Simply stated, Respondent's position in this case (sustained below) is that she is entitled to sell the real property at issue even if the estate were solvent and despite the fact that the sale could not benefit the estate. Such a sale would be a mere idle act, as the entire proceeds would be "surplus" which the trustee would be compelled by Section 726 to distribute to the Debtor, who would then continue to hold the property as trustee for Petitioners' benefit. The estate and the other creditors could derive no benefit from such a maneuver. They will be paid in full from the cash which is presently on deposit in this solvent estate. The Petitioners, however, would be irreparably harmed, as

they would lose irreplaceable real property.

Accordingly, it was improper to conclude that the solvency of the estate is irrelevant. The summary judgment ought to be reversed.

Dated: August 27, 1986

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: Edward Fitzsimmons, Debtor.	
KLAUS PORZIG and ELLEN PORZIG, Appellants, v. M. NOLDEN, Trustee in Bankruptcy of the Estate of Edward R. Fitzsimmons, Appellee.	No. 85-2079 D.C. No. C-85-1498-MHP Bkcy. No. 4-80-02300-HN **MEMORANDUM***

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

Appeal from United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge,
Presiding

Submitted March 11, 1986 **

Before: GOODWIN, NORRIS, and BRUNETTI,
Circuit Judges.

The Porzigs appeal a grant of summary judgment for the bankruptcy trustee, enabling her to avoid their claim to a beneficial interest in a piece of the debtor's property. We affirm the district court's affirmance of the bankruptcy court's decision.

This action is another in a series arising out of the bankruptcy of Edward Fitzsimmons. He filed a voluntary petition under Chapter 11 of the Bankruptcy

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** This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 3(f).

Code, 11 U.S.C. §1101 et. seq. (1982), on July 21, 1980. Thirteen months earlier, he had purchased 1.7 acres of unimproved property on the Mendocino County coast. The deed was recorded in his name on June 19, 1979. The next day he and the Porzigs, his daughter and son-in-law, signed a letter purporting to set up an equitable interest in the property in favor of the Porzigs. They agreed that Fitzsimmons would make the initial payments on a deed of trust of $25,000, and hold record title to the property for the Porzigs; they would take over the payments in 1980, and reimburse Fitzsimmons for the initial payments. Fitzsimmons promised to convey title to the Porzigs after the payments on the note were completed, but until then they were "not authorized to encumber this property in any way." The letter was not recorded.

The Porzigs paid their first installment on the note in December 1980. In June 1982, they were assigned the deed of trust. Title remains in the debtor's name.

On October 22, 1982 the trustee filed a complaint in bankruptcy court to avoid, pursuant to 11 U.S.C. §544(a)(3) (1982), appellants' claim to a beneficial interest in the property based on the June 1979 letter.

The bankruptcy judge granted summary judgment for the trustee. He rejected the Porzigs' argument that summary judgment was improper because the debtor's solvency was at issue, requiring the court to resolve that question before permitting the trustee to collect and liquidate the property of the estate, under 11 U.S.C. §704(1) (1982). In granting the trustee's motion, the court

states, "[t]he allegation that the estate is greater than the legitimate claims of creditors is irrelevant."

The bankruptcy court was correct. Nothing in the Code or in the legislative history supports appellants' claim that a debtor's solvency affects the manner in which the trustee administers the estate. The two provisions upon which appellants rely, 11 U.S.C. §§704(1), 726(a)(6) (1982), are inapposite. Section 704(1), in admonishing the trustee to consider the "interests of parties in interest," contemplates a situation, for example, where property of the estate may potentially increase in value, so that prompt sale would deprive the estate of funds. Section 704(1) is not a license for unsecured creditors to dictate to the trustee how to administer the estate.

Further, adjudicating the solvency or insolvency of an estate is a time-consuming and costly endeavor. Requiring the trustee to prove insolvency at this stage would tend to undermine the mandate of 11 U.S.C. §704(1) (1982) that the trustee "expeditiously" liquidate property of the estate, and would consume resources in administration that might otherwise be distributed to creditors or, perhaps, to the debtor.

The new Code invested the trustee with great discretion in performing her duties in order "to separate the court from day-to-day administrative activities . . . and, in turn, the trustee from ex parte contact with the judge." 2 L. P. King, Collier on Bankruptcy ¶ 363.03 at 363-18 to 363-19 (15th ed. 1985). The trustee's decision to sell the property is entitled to deference.

Section 726(a)(6) of 11 U.S.C. (1982) simply provides that any property remaining in the estate after all claims have been paid shall be returned to the debtor; in no way does it prevent the trustee from selling property as she sees fit.

Nor does the sole case which appellants cite support their position. In re Joslyn, 198 F.2d 673 (7th Cir. 1952), cert. denied, 345 U.S. 905 (1953), held that where the debtor's father paid the full amount of a debt still outstanding after the original bankruptcy proceeding was closed, the trustee was not entitled once again to have all the debtor's assets turned over to him for liquidation and distribution, even though the debtor failed to schedule one asset in the original proceeding. See In re Joslyn, 102 F. Supp. 521, 524 (N.D. Ill. 1951).

The unscheduled asset, the debtor's interest in trust income, was probably not subject to execution under state law anyway.

Here, the bankruptcy proceeding is still pending, the trustee already has authority over all property of the estate and the debtor has many outstanding debts. Further, the Porzigs' claim to an equitable interest in the property is inferior to that which the trustee may assert.

Under 11 U.S.C. §544(a)(3) (1982), the Trustee can avoid any interest in real property which would be defeasible under state law by a bona fide purchaser of that property. In California, a bona fide purchaser of real property takes free of any unrecorded interests. California Civil Code Ann. §1214 (West 1982) provides that "[e]very conveyance

of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property . . . in good faith and for a valuable consideration, whose conveyance is first duly recorded. . . ."

The Porzigs' equitable interest in the property, "devised" by the 1979 "trust agreement," is invalid against subsequent bona fide purchaser's because it is unrecorded. The debtor has never relinquished title to that property. The trustee, therefore, may properly invoke 11 U.S.C. §544(a)(3) (1982) to avoid the Porzigs' purported equitable interest.

The appellants' insistence that §544(a)(3) does not apply because there was never any "transfer" from Fitzsimmons to themselves is without merit. Section 544(a)(3) does not require a transfer;

that provision simply looks to the validity of an interest as against a bona fide purchaser and enables a Trustee to avoid that interest if a bona fide purchaser could have done so.

On the other hand, the Porzigs' deed of trust is recorded and valid, and will be transferred to the proceeds of a sale of the property, without diminution of their rights. Also, the Porzigs may bid on the property when it is put up for sale; their purchase price would be offset by the value of their liens. 11 U.S.C. §363 (1982).

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re: Edward Fitzsimmons, Debtor.	No. C-85-1498-MHP
KLAUS PORZIG and ELLEN PORZIG	Bankruptcy No. 4-80-02300 HN (Chapter 7)
Appellants,	D.C. No. C-85-1498-MHP Bkcy. No. 4-80-02300-HN
v.	
M. NOLDEN, Trustee in Bankruptcy of the Estate of Edward R. Fitzsimmons,	ORDER
Respondent.	

In this action appellants seek review of summary judgment entered by the Bankruptcy Court which concluded that appellants' interest in the subject real property could be avoided by the Bankruptcy Trustee and the property sold to satisfy creditors' claims. Appellants

contend that the court erred in both its finding that the solvency of the debtor's estate is irrelevant and in basing its conclusion on that finding.

For the reasons set forth below, this court concludes that the Bankruptcy Court was correct in its ruling and accordingly, the summary judgment entered in respondent's favor is affirmed. As ordered by the Bankruptcy court and pursuant to this judgment, respondent may sell the subject real property free and clear of any liens asserted by appellants, including the beneficial interest in the note and deed of trust held by them.

I. Summary of Facts

On July 21, 1980 respondent filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §1101 et seq. This claim concerns unimproved real

property located on the coast in Mendocino County. By deed recorded on June 19, 1979, respondent acquired the legal title to said real property subject to a deed of trust in favor of Tiney Mitchell and Gladys Mitchell. Respondent provided a promissory note in the face amount of $25,000 as well as a down-payment in the amount of $5,000. On the following day a letter purporting to set up an equitable interest in the property in favor of appellants was signed by respondent and appellants. The letter was never recorded. Two years later, after the filing of the Chapter 11 petition, appellants acquired through assignment the beneficial interest in the Mitchell note and deed of trust. It is alleged that appellants, who are respondent's daughter and son-in-law, also acquired from respondent an equitable

interest in the real property by virtue of an unrecorded letter agreement. In connection with this action, appellants claim both a secured debt and the entire beneficial ownership in the property.

II. Summary of Procedural Facts

On October 22, 1982 respondent's Chapter 11 Bankruptcy Trustee, Edward M. Walsh, commenced an adversary proceeding against the state, the Mitchells and appellants seeking, inter alia, an order authorizing plaintiff to sell the real property free and clear of any liens asserted by defendants-appellants, including the beneficial interest in the note and deed of trust. The state subsequently filed a disclaimer; a default was entered regarding the Mitchells. The bankruptcy matter was converted to a Chapter 7 proceeding and Mr. Nolden, the newly-appointed Bankruptcy Trustee, was

substituted as plaintiff. On August 13, 1984 the Trustee as plaintiff filed a motion for judgment. The Trustee also requested that appellants' deed of trust lien be transferred to the proceeds of the sale and, pursuant to §544(a)(3) of Chapter 11 of the Bankruptcy Code, that the purported trust be held ineffective and of no validity.

Plaintiff's motion was denied; however, upon rehearing, the Bankruptcy Court reversed itself and a judgment was entered authorizing the sale of the property free and clear of any liens of appellants, the state or the Mitchells. The court further ruled that any valid claim of appellants, arising from the assignment to them of a beneficial interest in the deed of trust secured by the subject real property, should be transferred to the proceeds of sale of

such real property. It is this judgment from which the appeal is taken. Pursuant to appellants' filing of their Notice of Appeal, the Bankruptcy Court properly issued its order preventing the Trustee from selling the subject property, pending this court's hearing.

III. Conclusions

The appropriate standard of review of a summary judgment order is the same as that applied by the Bankruptcy Court under Fe. R. Civ. P. 56(e). A bankruptcy judge's conclusions of law are subject to de novo review in the district court. In re Morrell, 42 B.R. 973, 975 (N.D. Cal. 1984).

It is the duty of the Bankruptcy Trustee to "collect and reduce to money the property of the estate ...." 11 U.S.C. §704(1). Contrary to appellants' contentions, with regard to the applica-

tion of §726(a)(6) of Chapter 11 of the Bankruptcy Code, the solvency of the debtor is irrelevant with respect to the Trustee's duties. The Trustee is required by statute to "collect and reduce to money the property of the estate" without regard to the actual insolvency at a particular point in time. See 11 U.S.C. §704(1). Appellant offers no authority nor can this court find any that supports his contention to the contrary. The Trustee is given discretion to collect the estate, reduce it to money and distribute it in accordance with the provision of the Act. Section 726 provides for the distribution. It is clear from the legislature history that Congress contemplated that a surplus might result and that it would revert to the debtor. S. Rep. No. 989, 95th Cong.,

2nd sess. 96-98 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5882-5884.

Furthermore, the transfer, if any, from debtor to appellants is voidable under §544(a)(3). As of July 21, 1980 all of the debtor's legal and equitable interests passed into the bankruptcy estate. This includes the subject property evidenced by a recorded deed showing debtor as the holder of legal title.

The Trustee stands in the position of a judgment lien creditor. See Angeles Real Estate Co. v. Kerxton, 737 F.2d 416, 418 (4th Cir. 1984). Therefore, we look to California law to determine whether a judgment lien creditor would prevail over appellants. Pursuant to Cal. Civ. Code §1214, appellants' unrecorded interest cannot prevail and is voidable by the Trustee.

Because there is no genuine issue of material fact, respondent is entitled to a judgment as a matter of law. Fe. R. Civ. P. 56(e). For the foregoing reasons,

IT IS HEREBY ORDERED that the summary judgment issued by the Bankruptcy Court in respondent's favor be AFFIRMED.

Dated: May 14, 1985.

MARILYN HALL PATEL
United States District Judge

UNITED STATES BANKRUPTCY COURT,

NORTHERN DISTRICT OF CALIFORNIA

In re

EDWARD R. FITZSIMMONS,
Debtor.

No. 4-80-02300HN

M. NOLDEN, Trustee in Bankruptcy,
of the Estate of EDWARD R. FITZSIMMONS,

No. 4-82-1578 AH

Plaintiff,

v.

STATE OF CALIFORNIA, TINEY MITCHELL,
GIADYS B. MITCHELL, KLAUS J. PORZIG,
and ELLEN F. PORZIG,
Defendants.

RULING UPON MOTION FOR RECONSIDERATION
OF MOTION FOR SUMMARY JUDGMENT

The Trustee's Motion for Reconsideration of the Order of this Court entered on September 21, 1984, denying her Motion for Summary Judgment in this case, was heard on October 23, 1984, MILTON MAXWELL NEWMARK, Esq. appearing for the Trustee, and DAVID M. McKIM, Esq. appearing for KLAUS J. PORZIG and ELLEN F. PORZIG. Upon further consideration of

all of the facts and arguments presented in support of and in opposition to the Trustee's Motion for Summary Judgment and for Reconsideration of the Court's Order Denying said Motion, the Court finds that:

1. It is the duty of the duly qualified Trustee of this estate to collect and reduce to money the property of the estate (11 USC §704(1)).

2. The real property which is the subject to the above-captioned adversary proceeding stands in the name of debtor EDWARD R. FITZSIMMONS.

3. The claim of defendants KLAUS J. PORZIG and ELLEN F. PORZIG is based upon an Assignment of a Deed of Trust covering said real property and an unrecorded letter purporting to establish a trust for their benefit.

4. Said defendants claim that it is unnecessary for the Trustee to exercise her powers to claim and sell debtor's interest in said real property because there is a surplus of assets over claims in this estate.

The Court concludes that:

1. The Trustee's authority and duty to collect and reduce to money the property of the estate requires that the Trustee be authorized to sell said property in the normal course of administration of the estate.

2. The claim of the Trustee prevails over the claim of the PORZIGS based upon an unrecorded letter.

3. The claim of the PORZIGS under their assignment by Note Secured by Deed of Trust may be transferred to the proceeds of the sale of said real property without diminution of their rights.

4. The allegation that the estate is greater than the legitimate claims of creditors is irrelevant and does not constitute a ground for denial of the Trustee's Motion.

Counsel for Trustee is directed to serve and file a proposed form of Judgment consistent with the foregoing.

Dated: November 21, 1984.

Cameron W. Wolfe
Bankruptcy Judge

Supreme Court, U.S.
FILED
SEP 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-355

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

KLAUS J. PORZIG AND ELLEN PORZIG,
Petitioners,

VS.

M. NOLDEN,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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9 pp

QUESTION PRESENTED

Should a writ of certiorari issue to permit this Court to review the affirmation by the Circuit Court of Appeals for the Ninth Circuit of judgment of the Bankruptcy Court authorizing the Bankruptcy Trustee to sell property of possibly solvent estate.

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent M. Nolden, Bankruptcy Trustee of Edward R. FitzSimmons, opposes the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 3, 1986.

STATEMENT OF THE CASE

Edward R. FitzSimmons, who was then admitted to practice law in the State of California, filed a voluntary petition under Chapter 11 of the Bankruptcy Code on July 21, 1980. On October 23, 1980 Edward M. Walsh was appointed trustee of the debtor estate, and on March 22, 1983 the case was converted to a proceeding under Chapter 7 of the Bankruptcy Code, and respondent M. Nolden was appointed Chapter 7 Bankruptcy Trustee. On June 1, 1984 respondent was substituted as plaintiff in this matter.

Respondent quotes from the Memorandum of the United States Circuit Court of Appeals for the Ninth Circuit which appears on page 2-a of Petitioners' Appendix:

> "... Edward Fitzsimmons ... filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et. seq.* (1982), on July 21, 1980. Thirteen months earlier, he had purchased 1.7 acres of unimproved property on the Mendocino County coast. The deed was recorded in his name on June 19, 1979. The next day he and the Porzigs, his daughter and son-in-law, signed a letter purporting to set up an equitable interest in the property in favor of the Porzigs. They agreed that Fitzsimmons would make the initial payments on a deed of trust of $25,000, and hold record title to the property for the Porzigs; they would take over the payments in 1980, and reimburse Fitzsimmons for the initial payments. Fitzsimmons promised to convey title to the Porzigs after the payments on the note were completed, but until then they were 'not authorized to encumber this property in any way.' The letter was not recorded.
>
> "The Porzigs paid their first installment on the note in December 1980. In June 1982 they were assigned the deed of trust. Title remains in the debtor's name.
>
> "On October 22, 1982 the trustee filed a complaint in bankruptcy court to avoid, pursuant to 11 U.S.C. § 544(a)(3) (1982), appellants' claim to a beneficial interest in the property based on the June 1979 letter.
>
> "The bankruptcy judge granted summary judgment for the trustee. He rejected the Porzigs' argument that summary judgment was improper because the debtor's solvency was at issue, requiring the court to resolve that question before permitting the trustee to collect and liquidate the property of the estate, under 11 U.S.C. § 704(1) (1982). In granting the trustee's motion, the court states, '[t]he allegation that the estate is greater than the legitimate claims of creditors is irrelevant.' "

The Court of Appeals affirmed the summary judgment issued by the Bankruptcy Court in respondent's favor holding inter alia:

> "The Porzigs' equitable interest in the property, 'devised' by the 1979 'trust agreement,' is invalid against subsequent bona fide purchaser's because it is unrecorded. The debtor has never relinquished title to that property. The trustee, therefore, may properly invoke 11 U.S.C. § 544(a)(3) (1982) to avoid the Porzigs' purported equitable interest."
>
> (Page 9-a of Petitioners' Appendix)

REASONS FOR DENYING THE WRIT OF CERTIORARI

The issuance of a writ of certiorari is inappropriate under Supreme Court Rule 17.

The decision of the Federal Court of Appeals appealed from is neither in substantial conflict with the decision of another Federal Court of Appeals nor is it a decision of a Federal Court of Appeals on an important question of federal law which has not been but should be settled by this Court.

Contrary to the assertion of the Petitioners, the ruling appealed from does not conflict squarely with the holding of the Seventh Circuit *In re Joslyn,* 198 F.2d 673.

As stated by the Court of Appeals for the Ninth Circuit in its Memorandum which appears on page 7-a of Petitioners' Appendix:

> "Nor does the sole case which appellants cite support their position. *In re Joslyn,* 198 F.2d 763 (7th Cir. 1952), *cert. denied,* 345 U.S. 905 (1953), held that where the debtor's father paid the full amount of a debt still outstanding after the original bankruptcy proceeding was closed, the trustee was not entitled once again to have all the debtor's assets turned over to him for liquidation and distribution, even though the debtor failed to schedule one asset in the original proceeding. *See in re Joslyn,* 102 F.Supp. 521, 524 (N.D. Ill. 1951). The unscheduled asset, the debtor's interest in trust income, was probably not subject to execution under state law anyway.

> "Here the bankruptcy proceeding is still pending, the trustee already has authority over all property of the estate and the debtor has many outstanding debts. Further, the Porzigs' claim to an equitable interest in the property is inferior to that which the trustee may assert."

Petitioners seek to imply that the debtor estate of Edward R. FitzSimmons is a solvent one. Respondent trustee has never conceded the solvency of such estate nor has there been a judicial determination to that effect. Respondent asserts that it is not a condition precedent for the authorization of a sale of debtor's property to litigate the solvency of the estate. Any other determination would place an impractical brake on bankruptcy administration. The public confidence in a bankruptcy system is maintained by the prompt and efficient operation thereof.

Petitioners assert that the inequity of the Ninth Circuit's holding provides grounds for review by this Court.*

In fact, the Ninth Circuit affirmed a judgment of the Bankruptcy Court which invalidated a trust assertedly arising from an unrecorded letter.

Petitioners also assert that the property at issue in this proceeding is property which has been held by the petitioners for many years. As appears from Order of District Court/Summary of Facts, which appears on page 12-a of Petitioners' Appendix, a voluntary petition was filed on July 21, 1980 and legal title to the real property in question was acquired by deed recorded June 19, 1979.

Respondent asserts that it is the duty of the bankruptcy trustee to "collect and reduce to money the property of the estate . . ." (11 U.S.C. § 704(1)) and that the solvency of the debtor is irrelevant with respect to the trustee's duties. This assertion was accepted by the Bankruptcy Court, the District Court and the Court of Appeals. In such circumstances, the granting of summary judgment was proper and 56(c) F.R.C.P. was inapposite because there was no genuine issue as to any material fact.

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* Petition for Writ of Certiorari, page 14.

CONCLUSION

Respondent's position is that the decision of the United States Court of Appeals for the Ninth Circuit concerning which a writ of certiorari is sought was fair, reasonable, substantiated by law and should not be the subject of a writ of certiorari by this Court.

Dated: September 26, 1986

Respectfully submitted,

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